REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 40 of 2016

PETER JAMBURI KIHIU……...…..………………………………….…….APPELLANT

VERSUS

REPUBLIC ……………………...…………..…...……..………….RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrates Court at Kiambu in Criminal Case 490 of 2013 delivered by Hon. J.N. Onyiego, CM on 25th February, 2015)

JUDGMENT

BACKGROUND

Peter Jamburi Hihiu, the Appellant herein was charged with committing the offence of attempted rape contrary to Section 4 of the Sexual Offences Act. The particulars were that on 26th January, 2013 at [particulars withheld] in Kiambu County, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of one A.W.N. without her consent. In the alternative, he was charged with committing an indecent act with an adult contrary to Section 11(a) of the Sexual offences Act. The particulars were that on 26th January, 2013, at [particulars withheld] in Kiambu County, intentionally and unlawfully touched the buttocks of A.W.N. using his hands, an act which was indecent, against her will.

The Appellant was found guilty of the main charge and convicted accordingly. He was sentenced to 5 years imprisonment. He was displeased with the decision and he preferred this appeal. He raised nine grounds of appeal which, when summarized are that he was convicted without sufficient evidence of his identification, that the magistrate erred in not making a verdict on the alternative count after convicting him on the main charge, that he was convicted on the basis of insufficient, inconsistent and uncorroborated evidence and on the whole that the case was not proved beyond a reasonable doubt.

SUBMISSIONS

The appeal was canvassed by way of written submissions. The Appellant was represented by learned counsel, Mr. Mathenge while the Respondent was represented by learned State Counsel, Ms. Sigei. On the behalf of the Appellant, it was submitted that the elements of the offence were not proved. Further that although it was alleged that the Appellant tore the complainant's (PW1) skirt which was submitted to the police, the investigating officer, PW7 did not detail when he received it. It was submitted that the evidence adduced by PW2, PW3, PW4 and PW5 was hearsay evidence which could not found a conviction against the Appellant. In addition, the identification of the Appellant was put to doubt, firstly, because the PW1's small gate was left open and any other person other than the Appellant could have

accessed the compound. Secondly, because the attack occurred at night when conditions of identification were not conducive. Thirdly, because PW1 could not have seen her attacker as she was attacked from the back. Therefore, the trial court ought to have warned itself of the danger of relying on a single identifying witness. On medical evidence it was submitted that the same was not sufficient to found a conviction against the Appellant. It was urged that the appeal be dismissed.

Ms. Sigei, for the Respondent in opposing the appeal submitted that all the elements the offence of attempted rape were proved as provided under Section 388 of the Criminal Procedure Code. On identification, she submitted that the same was by of recognition as the Appellant was known PW1. Therefore, the Appellant's defence that there was just a confrontation between himself and PW1 overt non-payment of his dues was an afterthought meant to divert the strong evidence that he intended to rape PW1. After all, PW1 had a torch which aided her in identifying the Appellant. In that case, the evidence on identification was full proof. She submitted that the Appellant's mobile phone was found at the locus in situ soon after the confrontation in which case he could not distance himself from the offence. Miss Sigei submitted that the Appellant's conviction was founded on sufficient and consistent evidence. As a consequence, she prayed that the appeal be dismissed.

EVIDENCE

It is trite that a first appellate court must reevaluate the evidence on record and arrive at its own conclusions. See: ***Okeno v. Republic[1972] EA 32.****In the present case***,** *the prosecution case was premised on the evidence of the complainant****, A.W.N*** *who testified as* **PW1.** *She hailed from [particulars withheld] where she worked as a business woman. She recalled that on 26th January, 2013 she left her place of work at around 8.00 p.m. he Appellant was a casual labourer at the home. Her daughter had gone to visit her cousins at a walking distance and she decided to take her clothes. She turned the security lights on and left using the rear gate. The small gate was not locked. She locked the gate behind her. She carried a torch with her. She returned home at about 10.00 p.m. On her way into the house she had the cows mooing. As she entered the gate she saw the Appellant in the compound. She wondered why he was there. She decided to go and check on the cows. She passed the Appellant without talking to him. She started feeding the cows with fodder grass. That is when she someone suddenly held from behind before knocking her to the ground. The person then lay on her before forcibly forcing her skirt down which got torn. She identified the attacker as the Appellant. A struggle ensued and she pushed the person off and ran away. He pursued her and she screamed. He again grabbed her and gagged her before she again pushed him off and he lost control and fell. She then picked a timber plank and hit him which prompted him to make his retreat. She followed him to the gate and ordered him the compound. She locked the gate after the Appellant left. She collected the house keys at the point of attack. She called her sister in law who together with her father in law arrived. They gave her first aid before she went to hospital for treatment. Thereafter, she reported the matter at Kiambu Police Station. She adduced the treatment notes as well as the P3 Form. She identified the Appellant's mobile phone which she testified was collected from the scene of crime. Her further testimony was that the Appellant hailed from her village and had worked on and off for her for around 10 years.*

PW2, J W N *testified that on 27th January, 2013 PW1 informed her that she was attacked the previous evening and had suffered injuries. She visited the complainant later that day and while at PW1's home, the Appellant arrived and asked PW1 to forgive her. But PW1 screamed and he ran away. Her testimony was that the Appellant wore a blood stained jacket.*

PW3, P W K w*as a brother in law to PW1. He testified that he was informed by his sister one H W that she had heard screams in their brother's compound. He informed his other brother and his wife and all of them proceeded to the scene. At the gate, they met with the Appellant who after opening the gate jumped over the fence and fled. PW1 informed him that the Appellant had tried to rape her. He saw injury on her knee. They offered her first aid before reporting the matter to the area chief and later to the police station. He testified that he collected the Appellant's mobile phone from the scene after he heard it ringing.*

PW4, A W N *testified that she only lived about 300 meters from PW1's house. On hearing the screams on*

the fateful night, she went to the scene where she found other relatives had arrived. She and ***PW5, H W*** *corroborated the evidence of PW3.*

PW6, Dr. Nectarious Ombaso *of Kiambu District Hospital testified on behalf of Doctor Kwasa of the same hospital who had examined PW1 on 6th February, 2013. The latter had complained of an assault and attempted rape against her. She had bruises on her back and a wound on her right knee. The wound was probably caused by a blunt object. The injury was classified as grievous harm. He produced the P3 that was signed by Dr. Kwasa. In cross examination, he stated that the injuries should have been harm not grievous harm.*

PW7, CPL Mercy Koech *of Kiambu Police Station was the investigating officer. She recorded the statement of PW1 and her witnesses. In addition PW1 handed over to her a skirt, a mobile phone make Samsung and a stick which she adduced in evidence.*

After the close of the prosecution case, the learned trial magistrate ruled that a prima facie case had been established and that the Appellant had a case to case to answer. He was called to tender a defence. He gave *a sworn statement of defence but did not call any witness. He testified that he was a farmhand at the Appellant's farm. In addition, he used to assist her at her shop with the loading and unloading shop items. His defence was that on the fateful night PW1 went home and started quarreling him that he had not fed the cows properly. He demanded to be paid his arrears which had accrued to Kshs. 700/-. That is when she ordered him to leave the compound. She picked up a piece of wood and started chasing him. She fell down in the process. She asked him to collect his money the next day at her shop. He testified that she never paid him the money. He denied he ever attempted to rape her. He also stated that he never touched her. He denied he left his mobile phone at the scene or ever wore blood soaked clothes.*

DETERMINATION

It is now the onerous duty of this court to determine whether the case was proved beyond a reasonable doubt. The conviction of the Appellant was based purely on the evidence of PW1 who was the victim. Suffice it to say is that PW1 was attacked when she was alone and no other person witnessed what transpired. It is therefore crucial that her evidence be critically analyzed.

According to PW1, she had left the house earlier in the night to deliver some clothes to her daughter who had visited a cousin. She returned at about 10.00 p.m. On arrival at the entry to the compound, she heard the cows mooing from the shed. She suspected that the Appellant had not fed them and that they were hungry. Towards the shed, she came across the Appellant whom she did not talk to. She went straight to where the cows were and started feeding them. According to her evidence, that is when the Appellant attacked her from the back. In my view, her account that the Appellant attacked her with the sole intention of raping her did not add up. First, according to the Appellant, there was a grudge between himself and PW1 owing to non-payment of some dues for work he had done for her at her shop. That would explains why when PW1 returned to the compound, she did not talk to the Appellant but went straight to find out why the cows were wooing. It would also explain that since the Appellant was angry, he refused to feed the cows. Indeed, the Appellant stated in his defence that PW1 on arrival home quarreled him for not properly feeding the cows. The same is vindicated by the fact that PW1 confirmed that the cows had not been fed and she began feeding them herself.

Second, after the confrontation between the Appellant and PW1, the evidence is that PW1 picked a timber plunk and started chasing the Appellant out of the compound. Again in my view, this conduct was not consistent with behavior of a person who had been sexually assaulted. It could only have happened if the confrontation was for any other reason as a result of which PW1 did not want to further deal with the Appellant. It again vindicates the Appellant's position that the two were not in talking terms because PW1 had not paid her dues. It further lends credit to the Appellant's defence that PW1 sustained injuries as she ran while chasing him. In any event, when PW1 raised alarm, her relatives started converging to her compound. None of them insinuated that PW1 had told them that the Appellant intended to rape her. They came across the Appellant at the gate and this must have been the time that PW1 was chasing him out of the compound. In my mind, that conduct plants a doubt that the Appellant intended to rape PW1.

Third, on the day after the incident, the Appellant returned to PW1's home seeking forgiveness for the confrontation they had had the previous night. I do not think that his behavior was also consistent with somebody who intended to rape his employer.

Fourth, it is factual that PW1's skirt got torn during the scuffle. But this was not unusual as her confrontation with the Appellant led her falling on the ground which explained the injury on her knee and back.

Fifth, the fact that the Appellant's mobile phone was found at the scene did ultimately link him to the offence. There is no doubt that he worked for PW1. There is also no doubt that he was at the scene following the confrontation with PW1. PW1 did also testify that after the confrontation he chased away the Appellant. It cannot be disputed that the phone could have fallen either as he ran away or during the scuffle. The recovery of the phone does not however constitute an element necessary for the proof of the offence.

Sixth, PW2 testified that when the Appellant visited PW1 on the following day, he wore a blood sustained jacket. It begs how PW1 and her witnesses did not inform the police about this issue. PW7, the investigating officer did not undertake investigations in this line which would have demonstrated the close contact between the Appellant and PW1. Such investigation would have ruled out that the injuries PW1 sustained were as a result of a fall.

From the summary of the evidence, I am more inclined to believe the Appellant's defence that he did not commit the offence. Instead, his confrontation with PW1 was owing to the grudge between them. As a result, I find that the prosecution did not prove the case beyond a reasonable doubt. This appeal must then succeed. I quash the conviction, set aside the sentence, and order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi this 15th day of November, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mr. Mathenge for the Appellant

2. M/s Kimiri for the R**espondent.**